

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 9, 2004 Session

CURLEY LEE HOWSE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. C-6247 Seth Norman, Judge

No. M2003-01134-CCA-R3-PC - Filed April 7, 2004

This is an appeal from the denial of a Motion to Re-Open Post Conviction Relief in order to obtain DNA testing of evidence gathered for the 1981 prosecution of the appellant for aggravated rape and sexual battery. Because the filing of the notice of appeal in this case was delinquent by approximately eight months, and because it does not appear to be in the interests of justice to excuse this delinquency, this appeal is DISMISSED.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and NORMA MCGEE OGLE, JJ., joined.

Anne M. Davenport, Nashville, Tennessee, for the appellant, Curley Lee Howse.

Paul G. Summers, Attorney General & Reporter; Elizabeth T. Ryan, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The appellant was convicted on March 17, 1981, of aggravated rape and two counts of sexual battery. He received a sentence of life imprisonment plus 70 years. See State v. Howse, 634 S.W.2d 652 (Tenn. Crim. App. 1982). On May 9, 2002, the appellant filed a document entitled Motion to Re-Open Post Conviction Relief. This motion is essentially a petition asking the trial court to order DNA analysis of evidence the appellant alleges was gathered during the investigation of the crimes for which the appellant was convicted. See Tenn. Code Ann. § 40-30-401 - 413.

On June 27, 2002, the trial court ordered the State to determine whether any evidence from the 1981 prosecution still existed. Based on the August 20, 2002, report of the State that no evidence remained from the 1981 prosecution, the trial judge, on August 22, 2002, dismissed the appellant's motion.

On May 8, 2003, almost eight months from the dismissal of his motion for DNA testing, the appellant filed a *pro se* motion to appeal indicating his desire to appeal the dismissal to this Court. On August 22, 2003, the trial judge appointed appellate counsel to pursue the instant appeal.¹

Timeliness of the Notice of Appeal

Tennessee Rule of Appellate Procedure 4 provides that a notice of appeal must be filed within thirty days of the judgment from which the appeal is taken, however "in the interest of justice" the timely filing of a notice of appeal may be waived by the appellate court. In the instant case the appellant failed to file the notice of appeal for almost eight months beyond the deadline prescribed by Rule 4. Nothing in the record or in the briefs of the parties demonstrates any excuse for failing to file the notice of appeal in a timely fashion. Moreover, the State's assertion that there is simply no DNA evidence currently in existence for testing leads us to the conclusion that the "interest of justice" does not require a waiver of the timely filing of the notice of appeal.

Conclusion

Based on the foregoing, the instant appeal is DISMISSED.

JERRY L. SMITH, JUDGE

¹We wish to emphasize that the appellant's current counsel has vigorously pursued this appeal on appellant's behalf. It was the appellant, not counsel, who is responsible for the untimely notice of appeal.